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No. 415

United States Supreme Court

OCTOBER TERM, 1928

SOUTHERN RAILWAY COMPANY ET AL.,
Petitioners,

versus

AARON A. B. CHATTERS,
Respondent.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF PETITIONERS.

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Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF ON BEHALF OF PETITIONERS.

May it please the Court:

JURISDICTIONAL SHOWING.

The opinions below herein are reported as Chatters *vs.* Louisville & Nashville Railroad Co. *et al.*, 17 Fed. (2) (D. C. E. D. La.) 305, and Louisville & Nashville Railroad Co. and Southern Railway Co. *vs.* Chatters, 26 Fed. (2) (5th C. C. A.) 403. The case is here on writs of certiorari granted (49 S. Ct. 26) in the present proceedings, and in the concurrent application for review filed by the Louis-

ville & Nashville Railroad Company in case No. 414 on the docket for this term.

This case is within the certiorari jurisdiction of this Court under the provisions of United States Code, Title 28, § 347 a (formerly Judicial Code, § 240 a). The judgment of the Circuit Court of Appeals now under review was rendered on June 2, 1928 (R., 424-32), and that Court denied a petition for rehearing on July 10, 1928 (R., 433). The petition for certiorari was filed here on September 6, 1928.

Since the case is here on writ of certiorari to a United States Circuit Court of Appeals, this Court has the power to pass upon *all questions arising on the record* (Donovan *vs.* Pennsylvania Co., 199 U. S., 279, 292). The points which we urge are (1) a plea to the jurisdiction (R., 7-8, 11-2, 23-4), which was overruled in the District Court (R., 11, 17-23, 25-26), and this ruling was affirmed by the Circuit Court of Appeals (R., 424-6); and (2) several rulings upon the trial of the case on the merits involving objections to the admissibility of certain evidence and the giving of charges to the jury (Bill No. 5, R., 385-7; Bill No. 10, R., 400-3; Bill No. 11, R., 403-5; Bill No. 16, R., 415-9), which rulings were deemed by the Circuit Court of Appeals not to involve any reversible or prejudicial error (R., 429-32). After the plea to the jurisdiction was overruled, this question was saved in the answer of the defendant (R., 27), and the record will show that all of the points here urged have been properly raised and properly preserved. All of points argued in this brief were *presented in the application for certiorari* (Alice State Bank *et al. vs.* Houston Pasture Co., 247 U. S. 240, 242).

STATEMENT OF CASE.

This action was instituted in the United States District Court for the *Eastern District of Louisiana* by Chatters, a citizen of Louisiana, against the Louisville & Nashville Railroad Company, a Kentucky corporation, and the Southern Railway Company, a *Virginia corporation* (R., 1-4). For the sake of brevity, we will refer to the defendants as the "L. & N." and the "Southern," respectively.

The plaintiff claimed damages in the sum of $36,087, on account of alleged injuries to his eyes by particles of glass from a broken window pane in a railroad car. *This accident occurred at a point in Virginia, on the line of the Southern.*

The plaintiff, on this trip in question, travelled from New Orleans, La., to Washington, D. C., *on a through coupon ticket purchased by him from the L. & N. in New Orleans*, which entitled him to transportation over that line from New Orleans to Montgomery, Ala., over the line of the Atlanta & West Point Railroad Company and the Western of Alabama Railway Company (hereinafter collectively termed the "A. & W. P.") from Montgomery, Ala., to Atlanta, Ga., and *over the line of the Southern from Atlanta, Ga., to Washington, D. C.* (R., 2, 113-4, 177-82). He made the entire trip on a *through train* called the "Piedmont Limited," operated over these railroad lines between New Orleans and Washington through the intermediate points just mentioned (R., 113-4, 155-6, 207-14).

The accident in question occurred in Virginia, on the Southern's line, about two hours' journey south of Washington (R., 2, 152, 163-4). An outside screen on one

window of the car in which plaintiff was riding became detached and swung against the glass of an adjacent window, breaking it (R., 2, 114, 154, 163-4).

Process against the Southern was *served upon the agent designated by it pursuant to Louisiana statutory provisions* (R., 8). The Southern *excepted to the jurisdiction*, upon the ground that the cause of action against it *did not arise out of any business done by it in Louisiana*, and that, as a foreign corporation which has designated an agent for service of process in Louisiana, it is *suable there only upon causes of action arising out of business done by it within that State* (R., 7-8, 11-2, 23-4). The evidence shows that while the Southern has designated an agent for service of process in Louisiana and maintains an office there for the solicitation of freight and passenger business for its railroad lines in other States, *it does not itself own or operate any railroad lines in that State* (R., 67-100). This exception was overruled by the District Court (R., 11, 17-22, 25-6).

The L. & N. interposed certain special defenses which will be fully detailed in the application for certiorari filed concurrently herewith by that defendant.

The case was tried before a jury, which returned a verdict for $3,087 against both defendants (R., 37-8), after plaintiff had waived his claim for $25,000 for alleged permanent injuries to his eyes (R., 235, 370). A motion for a new trial was denied (R., 39-40). Both defendants then prosecuted writs of error to the United States Circuit Court of Appeals for the Fifth Circuit (R., 40-1, 47). The Southern assigned as error the overruling of its exception to the jurisdiction, as well as the other rulings

herein complained of (R., 48-63). The L. & N. joined in some of these assignments (R., 53-63) and assigned other errors peculiar to its own defenses (R., 41-6).

The circuit court of appeals held that no reversible error had been committed as to either defendant, and affirmed the judgment (R., 424-32). Motions for rehearing by both defendants were denied (R., 433).

SPECIFICATION OF ERRORS URGED

(1). The overruling of the plea to the jurisdiction (R., 7-8, 11-2, 17-26, 424-6), and the holding that a foreign corporation is subject to suit in a Federal District Court, through service of process upon the *agent designated by it pursuant to State statutory requirements*, although *the cause of action does not arise out of any business done by this foreign corporation within that State*, and although the State rule of law is that *an implication of consent to be sued* results from this designation of an agent for service of process *only quoad causes of action arising out of business done within that State.*

(2). The admission of plaintiff's testimony as to *statements assertedly made to him by two physicians* (not sworn as witnesses) concerning the condition of his eyes, over the objection of defendants that this was *inadmissible hearsay* (Bill No. 5, R., 385-7), and the holding of the Circuit Court of Appeals that these rulings were *"not prejudicial error"* (R., 429-30).

(3). The admission, upon the issue of plaintiff's asserted loss of earnings as a representative of the Mullins River Lumber Company of British Honduras, of a letter from an officer of that concern (not sworn as a witness)

to plaintiff, containing *asserted statements of fact* tending to support the plaintiff's case on this issue, over the objection that *this letter was inadmissible as proof of the asserted facts therein recited* (Bill No. 10, R., 400-3; R., 232-3), and the holding of the Circuit Court of Appeals that this ruling *"did not involve reversible error"* (R., 430-2).

(4). The *denial of defendants' motion to instruct the jury to find for defendants* upon plaintiff's claim for $500 as asserted loss of earnings as a representative of the Mullins River Lumber Company (Bill No. 11, R., 403-5), and the approval of this ruling by the Circuit Court of Appeals (R., 432).

(5). The charge of the District Judge to the jury that the defendants in this case are *jointly liable* to plaintiff under the contract of carriage in question, to which the Southern excepted upon the ground that *this erroneously imposed upon it a liability for the consequences of the negligence of the L. & N.* (Bill No. 16, R., 415-9); and the approval of this charge by the Circuit Court of Appeals (R., 432).

We will now discuss the foregoing points *seriatim*.

POINT NO. 1.

Plea to Jurisdiction.

STATEMENT OF PLEA.

The exception of the Southern to the jurisdiction rests upon the three following propositions:

(A) That when a foreign corporation, sued in a Federal district court, has *designated an agent for service of process pursuant to State statutory provisions*, the Federal court will recognize *the limitations fixed by State law* as to the jurisdiction acquired *quoad* such a defendant, through service upon this designated agent.

(B) That, under the *Louisiana law*, a foreign corporation, which has designated an agent for service of process, pursuant to State statutory provisions, is *subject to suit in the Louisiana courts only upon causes of action arising out of business done in that State*, and not upon causes of action arising elsewhere.

(C) That the present cause of action, *insofar as the Southern is concerned, does not arise out of any business done by the Southern in Louisiana*, but arises entirely out of business done by that corporation outside that State.

FACTS.

The facts upon the jurisdictional issue are simple and undisputed. While the plaintiff purchased from the L. & N., in New Orleans, a through ticket for a trip from that point to Washington, *this ticket did not entitle him to transportation by the Southern until he reached Atlanta* (R., 2, 113-4, 177-82). The L. & N., which sold this ticket in New Orleans and which transported this passenger from that point to Montgomery, and the Atlanta & West Point, which transported him from Montgomery to Atlanta, are both corporate entities, *entirely separate and distinct from the Southern*, and are not subsidiaries of the Southern (R., 85). *The Southern received this passenger at Atlanta and transported him from that point to Washington* (R.,

2-3, 156, 177-82). The accident occurred at some point in Virginia about two hours' south of Washington (R., 2, 152, 163-4).

The trip was made on a through train operated between New Orleans and Washington, over the lines of the three railroads in question (R., 113-4, 155-6, 207-14). The plaintiff rode in the same car for the entire length of his journey (R., 113-4). This car was the property of the Southern (R., 155).

The Southern itself operates no railroad lines at all within the State of Louisiana (R., 67-8). Railroad properties within that State are owned and operated by the New Orleans Terminal Company and the New Orleans & Northeastern Railroad Company, which are separate corporate entities and function as such, and practically all of the stock in these corporations is owned by the Southern (R., 67-85). *Neither of these lines participated at all in the movement of this passenger.* The Southern maintains passenger and freight soliciting offices in New Orleans, along with a number of other affiliated railroad corporations such as the two just named, and this office solicits freight and passenger business for the lines of the Southern itself, which are located entirely outside of Louisiana (R., 70). *The Southern has designated a Louisiana agent for service of process, in accordance with the State statutory provisions on the subject* (R., 17, 67), *and process in this suit was served upon that agent* (R., 17).

Point No. 1 A.

Plea to Jurisdiction.

Federal Courts Follow State Rule as to Jurisdiction in Suit Against Foreign Corporation Served Through Designated Agent for Service of Process.

The main basis of the ruling against us on the jurisdictional issue, both in the District Court (R., 17-22), and in the Circuit Court of Appeals (R., 424-6), is the holding that when a foreign corporation is doing business within a State and has designated a statutory agent for service of process there, and when the requisites peculiar to Federal district court jurisdiction are present (in this case, diversity of citizenship, amount involved more than $3,000, and district of plaintiff's residence), the Federal district court has jurisdiction, *regardless of the situs of the origin of the cause of action and regardless of the State rule on the subject.*

The pertinent Federal statutes on this subject read as follows:

U. S. Code, Title 28, § 41 (Judicial Code, § 24):

> "The District Courts shall have original jurisdiction, as follows:
>
> "First. Of all suits of a civil nature, at common law or in equity * * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and * * * * (b) is between citizens of different States * * * *."

U. S. Code, Title 28, § 112 a (Judicial Code, § 51 a):

> "* * * * where the jurisdiction is founded only on the fact that the action is between citizens

> of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Your Honors will note that the statutes quoted above deal with the subject of jurisdiction *in general terms only. Nothing is there said about the issue here involved—the extent of the implication of consent to be sued* resulting from the fact that a foreign corporation has appointed a statutory agent for service of process in connection with its operation in a state other than that of its domicile.

We submit that the rulings below upon this issue are in conflict with a number of decisions of this Court, cited hereinafter, and we place particular emphasis in this connection upon the *two recent cases of* Mitchell Furniture Co. *vs.* Selden-Breck Construction Co., 257 U. S., 213, and Missouri Pacific Railroad Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533.

In supporting this ruling, the district judge cited (R., 17-22) quite a number of authorities, but the Circuit Court of Appeals (R., 424-6) confined itself to *one citation,* Barrow Steamship Co. *vs.* Kane, 170 U. S., 100. This was a suit by a citizen of New Jersey in a New York Federal court against a foreign corporation doing business in New York. Plaintiff claimed damages for an assault upon him by employees of defendant at Londonderry, Ireland, in the course of a voyage from Londonderry to New York. Service was made upon the agents having charge of defendant's business in New York, but it was *not shown that the defendant had designated a statutory agent* for service of process in that State (170 U. S., 104).

The defendant questioned the jurisdiction, invoking the rule of State law (170 U. S., 104-5) that a *non-resident plaintiff* could not sue a non-resident defendant in the New York State courts, except upon a cause of action arising in that State. This Court held this restriction inapplicable to an action in a Federal court, saying (p. 112):

> "The fact that the legislature of the State of New York has not seen fit to authorize like suits to be brought in its own courts *by citizens and residents of other States* cannot deprive such citizens of their right to invoke the jurisdiction of the national courts under the Constitution and laws of the United States."

The cited case does not involve the situation here presented—a *resident plaintiff* seeking to sue a foreign corporation in a Federal district court, *although such a suit could not have been maintained by this resident plaintiff in a court of his own State, having the same territorial jurisdiction*, because of the foreign situs of the origin of the cause of action. On the contrary, the State statute involved in the cited case (170 U. S., 104), *discriminated between resident plaintiffs and non-resident plaintiffs*, permitting the former to sue a foreign corporation doing business in the State upon any cause of action, but permitting the latter to sue such a defendant only upon a cause of action arising within the State. This Court recently condemned such a discrimination against non-resident plaintiffs in Missouri-Pacific R. R. Co *vs.* Clarendon Boat Oar Co., 257 U. S., 533, saying (p. 535):

> "Under § 2 of Article IV of the Federal Constitution, the citizens of each State are entitled to all privileges and immunities of citizens in the several

> States. *This secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State.*"

This *lone decision* cited by the Circuit Court of Appeals was rendered thirty years ago, at a time when the development of the law governing jurisdictional questions in suits against foreign corporations was *still in its early stages*. All of the other and even less pertinent decisions of this Court cited on this point by the district judge were rendered in the *same era*.

The decision in the Barrow Steamship Company case was rendered *before this Court decided* (Old Wayne Mutual Life Assn. *vs.* McDonough, 204 U. S., 8; Simon *vs.* Southern Ry Co., 236 U. S., 115) that when a foreign corporation does business in a State *without designating* the required statutory agent for service of process, its presumed assent to being sued there is *strictly limited to causes of action arising out of business done by it within that State*. Since the foreign corporation in the Barrow Steamship Company case was not shown to have designated an agent for service of process in New York (170 U. S., 104), a *different result* would have been reached in that case by the application of the doctrine *subsequently developed* in these two later cases.

The next step in the *progressive development* of the law on this subject was Pennsylvania Fire Insurance Co. *vs.* Gold Issue Mining & Milling Co., 243 U. S., 93. This Court there held that, *when a foreign corporation has designated an agent* for service of process pursuant to State statutory requirements, *it is for the State to determine whether this agency covers service of process only*

in suits arising out of business done within the State, or whether this agency extends to service of process in all transitory actions, however and wherever arising. This Court assimilated the appointment of a statutory agent for service of process to the *creation of an agency by a written document*, the terms of which are subject to State judicial interpretation. To this effect it said (p. 96):

> "But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts."

This doctrine puts the plaintiff here in an *inconsistent position*. If the Southern had not designated an agent for service of process in Louisiana, *it is extremely doubtful whether it would have been suable in Louisiana at all*, since the record shows (R., 105-9) that the only business which the Southern itself transacts in Louisiana is the soliciting of freight and passenger business for the benefit of its own railroad lines located entirely outside the State (Green *vs.* C. B. & Q. R. R. Co., 205 U. S., 530; Davis *vs.* Farmers Co-operative Equity Company, 262 U. S. 312). In the absence of such a designation of a statutory agent for service of process, this foreign corporation would have been suable in Louisiana, if at all, *only upon causes of action arising out of the business transacted by it in that State and not upon causes of action arising elsewhere* (Simon *vs.* Southern Railway Company, 236 U. S., 115; Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8).

The plaintiff accordingly assumes an untenable position when he argues that the Federal District Court sitting in Louisiana has jurisdiction of a defendant foreign

corporation served through its statutory agent even though the Louisiana rule restricts actions against the foreign corporation through service upon that agent to suits upon causes of action arising out of business done by that corporation within the State, and even though this particular cause of action does not arise out of any business done by the foreign corporation within the State. In such a situation, the plaintiff, in an effort to bring the defendant into court, *uses the statutory agent;* and then, *having thus taken the benefit of the State statutes* and used the statutory agent, *inconsistently argues that that agent has greater powers than the State statute gives him* (Pennsylvania Fire Insurance Co. *vs.* Gold Issue Mining & Milling Co., 243 U. S., 93). The two positions are clearly incompatible. *Plaintiff seeks the benefits of an agency which the State law has created, and at the same time he repudiates the limitations upon this agency established by this same State law.*

The Circuit Court of Appeals appeared to entertain the view that the District Court had jurisdiction of the suit as against the Southern, because the Southern was doing some business in Louisiana and because service was made there upon one of its agents; and that accordingly the fact that this agent was the designated statutory agent for service of process and the State rule as to the extent of the implication of consent to be sued resulting from such a designation, were not material upon the jurisdictional question (R., 426). Jurisdiction in the present case cannot be maintained upon this theory, since the implication of consent to be sued resulting from the doing of business in a State by a foreign corporation, unless there be a compliance with the State requirement for the

designation of a statutory agent, is always *restricted to actions arising out of business done by the foreign corporation in that State.* (Simon *vs.* Southern Railway Company, 236 U. S., 115; Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8). It is *impossible to sever* the jurisdictional issue in this case from the issue of the extent of the implication of consent to be sued resulting from the designation by the Southern of a statutory agent for service of process in Louisiana.

The rulings of the District Court and the Circuit Court of Appeals on this issue *conflict directly with the ruling of this Court in the recent case* of Mitchell Furniture Company *vs.* Seldon-Breck Construction Company, 257 U. S., 213, an action filed in an Ohio State Court by an Ohio corporation, for damages for the breach of a contract made outside Ohio and to be performed outside Ohio. The defendant was a foreign corporation which had done business in Ohio, and which had qualified in that State by designating an agent for service of process pursuant to the State statutes. *Service was made upon this designated agent.* This defendant removed the suit to the appropriate Ohio Federal District Court, which held that this service did not give the court jurisdiction over the defendant. That court then dismissed the suit for want of jurisdiction, upon the plaintiff's statement that it could not secure service otherwise (257 U. S., 214). As this analysis shows, while the suit originated in a State court, *it was removed to a Federal court and the jurisdictional question passed upon by the latter court involved its own jurisdiction,* and not merely the jurisdiction of the State court.

Upon appeal, this Court affirmed the judgment, saying (p. 215):

> *"The purpose in requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the* State. Of course when a foreign corporation appoints one as required by statutes *it takes the risk* of the construction that will be put upon the statute and the scope of the agency by the State court. Pennsylvania Fire Insurance Co. *vs.* Gold Issue Mining & Milling Co., 243 U. S., 93. But the reasons for a limited interpretation of a compulsory assent are hardly less strong when the assent is expressed by the appointment of an agent than when it is implied from going into business in the State without appointing one. In the latter case the implication is limited to business transacted within the State. Simon *vs.* Southern Ry Co., 236 U. S., 115, 131, 132. Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8, 22, 23. *Unless the State law either expressly or by local construction gives to the appointment a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere,* at least if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence. Chipman, Ltd., *vs.* Thomas B. Jeffery Co., 251 U. S., 373. *The indications of the Ohio statutes, so far as they go, look to 'liability incurred within this State.' Gen. Code* § 181. *As we know of no decision to the contrary by the Supreme Court of Ohio, we are of opinion that the service upon Nash was bad."*

This is a recent and direct ruling by this Court that the jurisdiction of a Federal district court over a foreign corporation, cited through service upon its agent designated for service of process under State statutory pro-

visions, *depends upon these State statutes and the interpretation thereof*. The decisions of the District Court and of the Circuit Court of Appeals are *directly in conflict with this recent ruling of this Court.*

Our case is even stronger than is the case just cited. In that case, the court ruled that a Federal district court has no jurisdiction in a suit against a foreign corporation arising out of business done outside the State, through service upon a statutory agent, *unless the State law "either expressly or by local construction"* (257 U. S., 216) *has extended the jurisdiction* acquired through service upon such an agent to suits arising out of business transacted outside the state. In the present case, on the other hand, the Louisiana jurisprudence, to which we will refer, *specifically restricts jurisdiction* over a foreign corporation with a designated agent for service of process, to suits arising out of business done within the State.

In this connection, see also Missouri Pacific Railroad Company *vs.* Clarendon Boat Oar Company, 257 U. S., 533, where this Court said (p. 535):

> "Provisions for making foreign corporations subject to service in the State is a *matter of legislative discretion*, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State. *Indeed, so clear is this that, in dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this Court has indicated a leaning toward a construction where*

possible, that would exclude from their operation causes of action not arising in the business done by them in the State." Mitchell Furniture Co. *v.* Selden Breck Construction Co., *ante*, 213; Old Wayne Mutual Life Association *v.* McDonough, 204 U. S. 8, 22; Simon *v.* Southern Ry. Co., 236 U. S. 115, 130.

Although *we cited and stressed these two recent and clearly pertinent rulings of this Court*, both in the District Court and in the Circuit Court of Appeals, *neither of these cases are mentioned*, either in the opinion of the District Court (R., 17-22), or in the opinion of the Circuit Court of Appeals (R., 424-6) herein. The *failure of either of the courts below to mention*, or to endeavor to distinguish or differentiate them is significant.

The rulings below also conflict with the ruling in Maxwell *vs.* Atchison Railroad Company, 34 Fed. (C. C. E. D. Mich.), 286—an opinion by Judge Brown, who shortly thereafter was appointed a Justice of this Court. That case, upon the jurisdictional issue, is *strikingly similar to the present case* as to the facts (34 Fed. 286-7), as to the situs of the origin of the cause of action (34 Fed., 287), and as to the rule of State law, limiting suits against foreign corporations to causes of action arising within the State (34 Fed., 287). In this situation, Judge Brown maintained a plea to jurisdiction, treating the rule of State law as applicable to the jurisdiction of a Federal court over such a case (34 Fed., 289).

In addition to the Barrow Steamship Company case (the *only authority* relied on by the Court of Appeals in support of its ruling on this point), the district judge also cited a number of other cases (R., 17-22). None of these

other decisions pass directly upon the point here at issue, and *none of them are as strong an authority for the position of the plaintiff on this point as is the Barrow Steamship Company case.*

Two of these cases pass upon the jurisdictional question as to suits in a State court, and not as to suits in a Federal Court (St. Clair *vs.* Cox, 106 U. S., 350, and Connecticut Mutual Life Insurance Company *vs.* Spratley, 172 U. S. 602). In the first case, the State judgment was held not enforcible under the full faith and credit clause, because of a lack of any proof that the defendant foreign corporation was doing business in the State. In the second case, jurisdiction was maintained upon the finding that the foreign corporation was doing business in the State. In the latter case, the suit arose out of business done in the State and the foreign corporation had actually designated an agent for service of process there. Neither of these rulings touch the issue here presented.

In Mexican Central Railway Company *vs.* Pinkney, 149 U. S. 194, this Court held that a State statute giving to a special appearance by a plea to the jurisdiction the effect of a general appearance, is inapplicable to proceedings in the Federal courts. As was there said, it is manifestly beyond the power of a State legislature to deprive a person of the right guaranteed to him by the Federal statutes to have the jurisdictional question preserved for review on appeal in Federal court litigation.

All that is held in Munster *vs.* Weil Corset Company, 261 U. S., 276, and Mechanical Ap. Co. *vs.* Castleman, 215 U. S. 437, is that when a defendant attacks the validity of the service of process, after removing the case to the Federal court, the procedure whereby this attack is made is

governed by the general principles of Federal law, and not by the State rule of practice.

In Walsh *vs.* Atlantic Coast Line Railroad Company, 256 Fed. (D. C. Mass.) 47, it was held that a foreign railroad corporation found to be doing business in Massachusetts, but having no designated agent for the service of process there, is subject to suit in that court on a cause of action arising in Florida. This ruling is clearly at variance with the decisions of this Court in Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8, and Simon *vs.* Southern Railway Co., 236 U. S., 115, to the effect that even if a foreign corporation is doing business in the State, its liability to suit there is necessarily restricted to causes of action there arising, if it has not designated an agent for service of process.

In Conley *vs.* Mathieson Alkali Works, 190 U. S., 406, the plea to the jurisdiction was maintained upon the familiar ground that the corporation was doing no business in the State and the officer served with process had come into the State for some other object than the transaction of corporate business. The same principle controlled the decision in Goldey *vs.* Morning News, 156 U. S., 518, wherein this Court refused to follow certain State decisions which upheld jurisdiction in a case of that character. Since these State rulings are clearly violative of the "due process" clause, it is easy to understand why this Court declined to follow them.

Upon the foregoing, we respectfully submit that the holdings of the District Court and the Circuit Court of Appeals upon this phase of the jurisdictional issue are *erroneous and in conflict with the decisions of this Court*

and the other Federal jurisprudence upon this question of law. As we have already indicated, the ruling against us below, on the jurisdictional issue, rested primarily upon the phase of that issue discussed in this section of our brief.

POINT No. 1 B.

Plea to Jurisdiction.

Foreign Corporation with Designated Agent for Service of Process not Suable in Louisiana Courts on Cause of Action not Arising Out of Business Done by It in That State.

The District Judge (R., 17) *conceded the correctness of our contention* that a foreign corporation designating an agent for service of process in Louisiana, becomes thereby suable in the State courts, under the State law, *only upon causes of action arising out of its business within that State*, and not upon causes of action arising out of its business elsewhere. The Circuit Court of Appeals *indicated a view to the contrary, but found it unnecessary to pass upon this point directly* (R., 424-5). The Circuit Court of Appeals made no reference to and apparently overlooked the *recent decision of this Court sustaining our contention* as to the Louisiana rule on this point (Missouri Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533, quoted *infra*).

This Court has definitely settled the rule to be that (1) when the foreign corporation is doing business in a State *without complying with statutory requirements for the designation of an agent* for service of process the jurisdiction of the courts of that State, as to suits against that

corporation, is *necessarily limited to causes of action arising out of business done in that State*, and cannot constitutionally extend to causes of action arising out of business done elsewhere (Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8; Simon *vs.* Southern Railway Company, 236 U. S., 115), and (2) when the foreign corporation has *designated an agent for service of process* pursuant to State statutory requirements, *it is for the State to determine*, either by a specific statute or by judicial interpretation, whether the foreign corporation is suable there only upon causes of action arising out of business done within that State, or whether the foreign corporation is suable there upon all transitory causes of action, however and wherever arising (Pennsylvania Fire Insurance Company *vs.* Gold Issue Mining & Milling Company, 243 U. S. 93).

This Court has very clearly recognized, in the recent case of Missouri Pacific Railroad Company *vs.* Clarendon Boat Oar Company, 257 U. S., 533, that *Louisiana has limited suits* in its courts against a foreign corporation with statutory agent, *to causes of action arising out of business done within the State*. The Louisiana decisions affirmed by this Court in that case are not reported, but the progress of that litigation through the State courts is thus described by this Court in the following language (p. 534):

> "Act 243 of 1912, p. 543, and Act 267 of 1914, p. 532, of the Annual Laws of Louisiana, provide that service on foreign corporations may be made on any agent which the corporation has designated, and require that every foreign corporation doing business in the State shall file a written declaration with the Secretary of State, showing its domicile and the place or places where it is to do business and designating its agent, resident in the parish

where its business is to be done, and that service on said agent, whether personal or domiciliary, shall be a valid service on it. *The Court of Appeals in this case held, following what it deemed to be the holding by the Louisiana Supreme Court in the case of Watkins vs. North American Land & Timber Co., 106 La. 621, 31 South. 172, 87 Am. St. Rep. 309, that the Louisiana statute was not intended to give the State courts jurisdiction over foreign corporations by service on agents appointed thereunder, in transitory actions arising in another State. The action of the Supreme Court in refusing to entertain an appeal in this cause shows this to be the authoritative construction of the statute by the State courts.*"

In affirming the judgment, and in approving the rule of State law thus outlined, this Court further said (p. 535):

"Provisions for making foreign corporations subject to service in the State is a *matter of legislative discretion*, and a failure to provide for such service is not a denial of due process. Still less is it incumbent upon a State in furnishing such process to make the jurisdiction over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the State. *Indeed, so clear is this that in dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this Court has indicated a leaning toward a construction, where possible, that would exclude from their operation causes of action not arising in the business done by them in the State.* Robert Mitchell Furniture Co. *vs.* Selden Breck Construction Co. (opinion handed down December 5, 1921), 257 U. S. 213, 42 S. Ct.

84, 66 L. Ed. 201; Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S. 22, 27 Sup. Ct. 236, 51 L. Ed. 345; Simon *vs.* Southern Railway, 236 U. S. 115, 130, 35 Sup. Ct. 255, 59 L. Ed. 492. The latter case was a Louisiana case under this same law."

More recent rulings to the same effect by the Louisiana courts are found in Delatour & Marmouget *vs.* Southern Railway Company, 4 La. Ap. 658, and Buscher *vs.* Southern Railway Company, 4 La. Ap. 653. These are companion suits (1) by the owners of four race-horses and (2) by the caretaker who accompanied these race-horses, for damages alleged to have been sustained in a railroad accident at Greenville, S. C., while the freight car containing the race-horses and the caretaker was in the custody of the Southern. This car was then moving from Washington to New Orleans over the *identical railroad lines* which carried the plaintiff in the present case from New Orleans to Washington. The cases just cited accordingly resemble the present case, in so far as the Southern is concerned, in that in each of these cases the movement over the lines of the Southern was between Atlanta, Ga., and Washington, D. C.—*entirely outside the State of Louisiana.* A further point of resemblance is that in each of these cases *the accident in question occurred at a point outside the State of Louisiana*, during the movement over the lines of the Southern between the points above named.

In the two cases cited, the Louisiana Court of Appeals for the Parish of Orleans maintained pleas to the jurisdiction filed by the Southern, based upon the *same contention* as is urged by that litigant here. As the report of these cases shows, *the Louisiana Supreme Court approved the ruling* by denying applications for writs of review.

The holding of the Court of Appeals for the Parish of Orleans in these cases (thus approved by the Louisiana Supreme Court) is stated in the syllabus (by the Court) in the two cases (4 La. App.. 653, 658). The wording of this syllabus (identical in both cases) is as follows:

> "In a transitory action *arising in another State*, the courts of this State, irrespective of the citizenship of the plaintiff, are *without jurisdiction to entertain a suit brought against a foreign corporation* doing no local business within this State. Under such conditions, a plea taken to the jurisdiction is well-founded, despite the fact that the defendant corporation, under the laws of this State, has *voluntarily designated an agent to represent it within this State*, as one upon whom citation may be served."

And in the body of the opinion in the Delatour & Marmouget case, the Court said, referring to the decision of this Court which we have cited *supra* (p. 661):

> "It is our opinion, that the question is no longer open to discussion, *in the light of what has been determined by the United States Supreme Court* in the case of Missouri Pacific Railroad Company *vs.* Clarendon Boat Oar Company, 257 U. S. 533."

This question is discussed in an earlier Louisiana decision, State *ex rel.* Watkins *vs.* North American Land & Timber Company, 106 La. 621, 31 Sou. 172, a mandamus proceeding involving the asserted right of a stockholder in an English corporation, qualified to do business and having an office in Louisiana, to inspect the corporate books and records of the Louisiana office. In that case the Louisiana Supreme Court referred to the jurisprudence

in *some other States* which permits a foreign corporation, with a designated agent for service of process, to be sued in such States upon all transitory causes of action, however or wherever arising, and it then said (p. 630):

> *"It is not necessary, nor would we be disposed, to adopt the extreme view last above referred to.* On the contrary, we might hold that the jurisdiction acquired by service of process on respondent's agent in this State is confined to cases in which the cause of action arises here, and nevertheless maintain the jurisdiction so acquired in the instant case. For, whilst the relator's right, if he has any, to inspect the respondent's books, may spring from the contract made in England, the cause of action disclosed in his petition consists of the refusal of the respondent's agent here to permit him to exercise that right."

A similar reference to the different and more liberal rule prevailing in *some other States* on this point will be found in the opinion in Williams *et al. vs.* Pope Manufacturing Co., 52 La. An. 1417, 27 Sou. 851, but that case actually involved a suit by residents of Mississippi against a foreign corporation doing business in New Orleans, for *an alleged tort committed in New Orleans* (libel, slander, public defamation, malicious prosecution and false imprisonment), and the question here involved was not there presented for decision.

It is clear from the foregoing that neither in the Watkins case nor in the Williams case was there any direct ruling adverse to our contention upon the point now at issue. Furthermore, the *later Louisiana jurisprudence* (which we have reviewed, which is directly in our favor,

and which has received the *specific approval of this Court*) clearly predominates over any dicta to the contrary which may be found in the two earlier cases.

When the decisions which we have cited were rendered, the Louisiana statute then in force on the subject of the designation of an agent for service of process by a foreign corporation was Act 243 of 1912, which reads as follows:

> "That it shall be the duty of every foreign corporation other than foreign insurance companies doing business in this State to file in the office of the Secretary of State a written declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business, the place of its principal business establishment, and the name of its agent or agents or other officer in this State upon whom process may be served, provided, that no foreign corporation shall select as its agent or agents for service any person not residing in a parish where said corporation has an established business and, provided further that *service on said agent whether personal or domiciliary shall constitute a valid service on said foreign corporation.* Provided that every foreign insurance company doing business in this State shall appoint the Secretary of State its agent upon whom all legal processes shall be served, and such service shall be legal and valid, as against such foreign insurance company."

Since the rendition of these decisions, but prior to the institution of the present suit, the Louisiana Legislature enacted on this subject Act 184 of 1924, which contains the following pertinent provisions:

"Section 2. The appointment of the agent or agents or officer upon whom service of process may be made shall be contained in a written power of attorney accompanied by a duly certified copy of the resolution of the Board of Directors of said corporation consenting and agreeing on the part of the said corporation that *any lawful process against the same which is served upon the said agent or officer shall be a valid service upon said corporation* and that the authority shall continue in force and be maintained as long as any liability remains outstanding against said corporation *growing out of or connected with the business done by said corporation in this State.*"

The latter portion of the above quotation from this new statute clearly indicates that the primary aim of the legislature was to subject the foreign corporation to suit in the State on *causes of action arising out of business done by it within the State.*

The Circuit Court of Appeals, in its opinion herein, suggests (R., 424-5) that the clause *"any lawful process against the same which is served upon the said agent or officer shall be a valid service upon said corporation"* has changed the State law upon the point under consideration, and that the specific decisions which we cite in our favor on this issue no longer represent the State law. The new statute in question has never been construed by any Louisiana court, and the clause stressed by the Circuit Court of Appeals, as quoted above, does not differ materially in its wording from the corresponding clause in the earlier statute, that *"service on said agent whether personal or domiciliary shall constitute a valid service upon said corporation."*

The *real new legislation* in Act 184 of 1924 is the added proviso *continuing the agency* for service of process as to all liabilities arising from operations in the State of a corporation that has left the State. The evident purpose of this enactment was to remedy this omission in the earlier statutes on the subject. See Gouner *vs.* Missouri Valley Bridge & Iron Co., 123 La. 964, 49 Sou. 657.

As we pointed out, there is *no substantial difference* in the wording of the two stattutes *quoad* the provision that process served on the designated agent is a valid service on the corporation. In this situation, *the construction of the earlier statute*, which sustains our contention, *applies also to the later statute*. To this effect, see the following authorities:

Stewart *vs.* Kahn, 11 Wall., 493 (p. 502):

> "A change of language in a revised statute will not change the law from what it was before, *unless it be apparent that such was the intention of the legislature.*"

Anderson *vs.* Pacific Coast S. S. Co., 225 U. S., 187 (p. 199):

> "For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect *unless such intention is clearly expressed.* United States *v.* Ryder, 110 U. S. 729, 740; United States *v.* LeBris, 121 U. S. 278, 280; Logan *v.* United States, 144 U. S. 263, 302; United States *v.* Mason, 218 U. S. 517, 525."

25 R. C. L., 1050:

> "In the case of a general revision or codification of statutes it is well settled that a mere change of phraseology or the omission or addition of words will not necessarily change the operation or construction of former statutes,

> for the new language may be attributed to a desire to condense and simplify the law. *The language of the statute as revised or the legislative intent to change the former statute must be clear before it can be pronounced that there is a change of such statute in construction and operation.*"

The point here involved is a question of State statutory construction. There are no State decisions construing the new statute. The suggestion of the Circuit Court of Appeals that the new statute has changed the State law in this respect (based upon an *unsubstantial variance* in the pertinent language of the two statutes in question), is in *direct conflict* with the rule for the interpretation of statutory provisions of this particular character, *stated by this Court in the two recent decisions* upon which we rely:

> Mitchell Furniture Company *vs.* Selden-Breck Construction Company, 257 U. S., 213 (p. 216):
>
> > "Unless the State law either expressly or by local construction gives to the appointment a larger scope, *we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere.* . . ."
>
> Missouri-Pacific R. R. Co. *vs.* Clarendon Boat Oar Co., 257 U. S., 533 (p. 535):
>
> > ". . . in dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, *this Court has indicated a leaning toward a construction where possible, that would exclude from their operation causes of action not arising in the business done by them in the State.*"

Upon the foregoing, we submit that the law is clearly with us upon this phase of the case, and that the suggestion of the Circuit Court of Appeals to the contrary is: (1) clearly erroneous, and (2) in *direct conflict with the pertinent principles enunciated in the decisions of this Court on the subject.*

POINT NO. 1 C.

Plea to Jurisdiction.

Present Suit Does Not Arise Out of Any Business Done by Southern in Louisiana.

The District Judge resolved this question *against us* (R., 17-8). The Circuit Court of Appeals *did not find it necessary to decide* this point.

The plaintiff bought his ticket in New Orleans from the L. & N. (R., 113-4). The train which carried him out of New Orleans and beyond the boundaries of Louisiana, was operated by the L. & N. over its own tracks (R., 207-8). From New Orleans to Atlanta, this train was operated by the L. & N. and other railroad corporations, all entirely independent of the Southern (R., 85). *All that the Southern did, as to the plaintiff, was to receive him as a passenger at Atlanta and to transport him from there to Washington, a movement entirely outside the boundaries of Louisiana. The accident occurred in the course of this transportation while the train was at some point in the State of Virginia* (R., 2, 152, 163-4).

The record shows that the *plaintiff's dealings in New Orleans* as to the trip in question were *entirely with the L. & N.* (R., 113-4), from which he purchased his ticket.

There is no showing in the record that he had any dealings in New Orleans as to the trip in question either with the Southern soliciting office there, or with the offices of the New Orleans Terminal Company and the New Orleans & Northeastern Railroad Company there. In fact, these lines operate a competing route to Washington from New Orleans.

On this phase of the case, we are accordingly not concerned with the fact that the Southern owns almost all of the stock in the New Orleans Terminal Company and the New Orleans & Northeastern Railroad Company (R., 80), which own and operate railroad properties in Louisiana (R., 68-70) but which *function as separate corporations* (R., 69-70). *This stock ownership does not make the acts of these other corporations the acts of the Southern* (Peterson *vs.* C. R. I. & P. Ry. Co., 205 U. S., 364). Nor are we concerned with the testimony as to the passenger and freight soliciting offices maintained in New Orleans by the Southern Railway System, which solicit freight and passenger business for the lines of the Southern itself, lying entirely outside the State of Louisiana (R., 70). Our plea to the jurisdiction is not based upon the allegation that the Southern does no business whatsoever in Louisiana, but rather upon the assertion that whatever business it may or may not do there in other connections, *the present suit does not arise out of any business done by it in that State*.

The argument that this suit as to the Southern exhibits a cause of action arising out of business done by that corporation in Louisiana rests upon the following elements:

(*a*) The purchase by plaintiff from the L. & N. in New Orleans of a through ticket entitling him to transportation from New Orleans to Washington and specifying travel over the lines of the Southern for that part of this journey between Atlanta and Washington.

(*b*) The transportation of plaintiff from New Orleans to Washington in a through train known as the Piedmont Limited, operated by the various other railroad corporations previously named, over their respective lines, and by the Southern over its lines, from Atlanta to Washington.

(*c*) The use in this through train of a car belonging to the Southern, and the fact that plaintiff rode in this car from New Orleans to Washington, the movement from New Orleans to Atlanta being over lines other than the Southern.

Under the jurisprudence of this Court, none of the above facts constitute the doing of business in a legal sense by the Southern in Louisiana. It follows from this that (whatever business the Southern may or may not do in Louisiana as to other matters) the present suit, *quoad* it, does not arise out of any business done by it within that State. The ruling of the District Judge in the present case to the contrary on this point is clearly at variance with the applicable jurisprudence of this Court.

These elements were *all involved* in the case of Peterson *vs.* C. R. I. & P. Ry. Co., 205 U. S. 364. In that case two railroad corporations (one called the Pacific Company and the other called the Gulf Company in the opinion) operated a *continuous railroad line* through Texas and other States. The Gulf Company owned and operated this line in Texas to the Texas border. The Pacific Company

owned and operated a line from that point northward. The suit in question was an action for damages for the alleged killing of an engineer in the employ of the Pacific Company in Indian Territory. The action was filed in a Texas Federal court. Jurisdiction was sought to be maintained as to the Pacific Company upon the theory that, because of its relationship with the Gulf Company, it was doing business in Texas *through the agency of the Gulf Company.*

It was shown that the Gulf Company sold tickets in Texas, good for a through trip over its own lines to the Texas border and over the lines of the Pacific Company beyond. It was further shown that the two railroads operated through trains, without any change of cars at the point where their lines joined at the Texas border. It was even shown that the same employees handled these trains on both sides of this point of joinder, being paid by the Gulf Company for the time which they worked on the Texas side of this point and being paid by the Pacific Company for the time which they worked on the other side of this point. It was also shown that the Pacific Company owned a controlling stock interest in the Gulf Company.

This Court held that this stock ownership did not make the Gulf Company the agent of the Pacific Company, saying (p. 391):

> "It is true that the Pacific Company practically owns the controlling stock in the Gulf Company, and that both companies constitute elements of the Rock Island System. But the holding of the majority interest in the stock does not mean the control of the active officers and agents of the local company doing business in Texas. That fact gave

> the Pacific Company the power to control the road by the election of directors of the Gulf Company, who could in turn elect officers or remove them from the places already held; *but this power does not make it the company transacting the local business.*"

This Court further held that the sale of through tickets by the Gulf Company, entitling the purchasers to transportation over the lines of the Pacific Company lying outside of Texas, did not constitute a doing of business in Texas by the Pacific Company. To this effect it said (p. 394):

> "The conductors, one of whom was served, when he crossed the Texas line, this record shows, *became the servant and agent of the Gulf Company.* The ticket agent sold tickets for the Gulf Company, in whose employment he was. He would also sell tickets good upon its line, and over the lines of the Pacific Company, but *he transacted this business as the agent of the Gulf Company.*"

For these and other reasons fully stated in the opinion, this Court held that the recited facts as to the relationship between the Pacific Company and the Gulf Company did not constitute a doing of any business in Texas by the Pacific Company, through the Gulf Company, so as to make the former subject to suit in that State. The judgment maintaining the plea to the jurisdiction was accordingly affirmed.

The present suit is not nearly so strong on the facts for the plaintiff as was the cited case. In the present case the L. & N., the seller of the ticket and the initial carrier, is an *independent corporation*, not a subsidiary of

the Southern and forming *no part of the Southern Railway System* (R., 85, 208). In the present case the Southern did not receive the plaintiff as a passenger until the train reached Atlanta, *several hundred miles from the Louisiana border* (R., 2). The lines of the Southern and of the L. & N. on this trip do not even directly connect, and there is an *intervening intermediate carrier* from Montgomery to Atlanta, the A. & W. P. (R., 208), which is neither owned nor controlled by the Southern (R., 85).

Another decision of this Court supporting our position in the case is Philadelphia & Reading Co. *vs.* McKibben, 243 U. S., 264. That case exhibits an effort to sue the Philadelphia & Reading Company in New York, although it was a Pennsylvania corporation operating and owning railroad lines in Pennsylvania and New Jersey, and not in New York. The suit arose out of a New Jersey accident.

One basis for the contention that the Philadelphia & Reading Company was doing business in New York was the fact that the Central Railroad Company of New Jersey sold through tickets in New York, good for transportation over its own lines in that State and over the lines of the Philadelphia & Reading Company in other States. The facts in this connection are fully stated in the opinion of the court. In holding that these facts do not amount to doing business in New York by the Philadelphia & Reading Company, this Court said (p. 268):

> "The finding that the defendant was doing business within the State of New York is disproved by the facts thus established. The defendant transacts no business there; nor is any business transacted there on its behalf, except in the sale of coupon tickets. *Obviously the sale by a local carrier*

of through tickets does not involve a doing of business within the State by each of the connecting carriers. If it did, nearly every railroad company in the country would be 'doing business' in every State."

Another case in point here is General Investment Co. *vs.* Lake Shore & M. S. R. R. Co. *et al.*, 256 Fed. (6th C. C. A.), 160; affirmed 260 U. S., 261. In that case, the ruling was that the New York Central Railroad Company was not doing business in Ohio and was not subject to suit there.

This railroad admittedly did not own or operate any property in Ohio itself, but the contention was that it was doing business there through its connecting lines, the plaintiff there invoking the elements (involved in this case also) of the sale of through tickets and the operation of through trains and through cars. The facts in this respect are fully set forth in the opinion of the Circuit Court of Appeals in the cited case (250 Fed., 165-6). That Court ruled against the plaintiff, following the decisions of this Court which we have just cited and saying (250 Fed., 166-7):

> "The doctrine of this case was recently reaffirmed and emphasized in Philadelphia Railway *v.* McKibbin, 243 U. S., *supra*, at page 268, 37 Sup. Ct., 280, 61 L. Ed., 710, in which it was held that *the sale by a local carrier within a State of through tickets over the line of a foreign connecting carrier did not involve a doing of business within the State by such connecting carrier*, otherwise, 'nearly every carrier in the country would be "doing business" in every State'; and that even if the defendants' 'subsidiary companies' did business within the State, this would not, under the authority of the Peterson case, warrant a finding that it did business there."

In affirming this judgment, this Court specifically rested its ruling upon the reasons assigned by the Circuit Court of Appeals, as to this phase of the case. (See 260 U. S., 268.)

Other cases sustained our contention upon this issue are as follows:

Cancelmo *vs.* Seaboard Air Line Ry., 12 Fed. (2) (Ct. Ap. D. C.), 166.
Allen *vs.* Yellowstone Park Transportation Co., 154 Fed. (C. C. E. D. Mo.), 504.
Maxwell vs. Atchison R. R. Co., 34 Fed. (C. C. E. D. Mich.), 286.

In contending that the present suit *quoad* the Southern arises out of business done by that corporation in Louisiana, the plaintiff's main argument has been that, when he purchased a through ticket from the L. & N., in New Orleans, entitling him to transportation over the line of the Southern from Atlanta to Washington, this transaction amounted to a doing of business in Louisiana by the Southern through the L. & N. as its *agent*. The decisions of this Court which we have already reviewed are sufficient to dispose of this argument. This contention is also *at variance with the ruling of this Court* in the recent case of Bank of America *vs.* Whitney Central National Bank, 261 U. S., 171, wherein it was contended that the Whitney Central National Bank (of New Orleans) was doing business in New York and subject to suit there because its business relationship with various New York banks constituted the latter as *agents* of the Whitney Bank in certain New York transactions. In affirming a judgment of dismissal for want of jurisdiction, this Court said (p. 173):

> "Its regular New York business was transacted for it by its correspondent—the six independent New York banks. *They, not the Whitney Central, were doing its business in New York.*"

Upon the foregoing, we respectfully submit that whatever other business the Southern may or may not do in Louisiana *the plaintiff's cause of action, as against the Southern, cannot be said to arise out of any business done by that corporation in Louisiana.* The plaintiff's cause of action, as against the Southern, rests entirely upon the facts (1) *that it transported him as a passenger from Atlanta to Washington, and* (2) *that an accident occurred in the course of this transportation at some point in Virginia.* In this situation, it is clear that, *quoad* the Southern, the plaintiff's cause of action arises out of business done by that corporation outside of Louisiana, and not out of any business done by that corporation within Louisiana. The decisions of this Court cited above clearly sustain this position, and it is obvious that the district judge and the Circuit Court of Appeals erred in not so holding.

Point No. 1 D.

Plea to Jurisdiction.

Rendition of Judgment by Court Without Jurisdiction Violative of Due Process Clause.

The constitutional issue of "*due process of law*" (R., 49) is involved in the jurisdictional question in this case. It is fundamental that *jurisdiction* in the court rendering the judgment is one of the *essentials of "due process."*

This has been recognized in the leading case of Pennoyer *vs.* Neff, 95 U. S., 714, wherein this Court said (p. 733):

> "Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that *proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.*"

While the language above quoted refers to "due process" in State court proceedings, this language is equally applicable to "due process" in Federal court proceedings, since the Fifth Amendment thus regulated Federal action long before the Fourteenth Amendment thus regulated State action.

The same principle is also stated in Twining *vs.* N. J., 211 U. S., 78, wherein this Court said (p. 110):

> *"Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction."* Pennoyer *v.* Neff, 95 U. S., 714, 733; Scott *v.* McNeal, 154 U. S., 34; Old Wayne Life Association *v.* McDonough, 204 U. S., 8."

To the same effect, see also Old Wayne Mutual Life Association *vs.* McDonough, 204 U. S., 8 (a case frequently cited in our argument on the jurisdictional question) wherein this Court thus described the contention which it there sustained (p. 15):

> "The plaintiff in error insists that the Pennsylvania court had no jurisdiction to proceed against

> it; consequently, the judgment it rendered was void for the want of the due process of law required by the Fourteenth Amendment."

If this Court sustains our contention that the Southern is not subject to suit in a Louisiana Federal District Court through service upon the agent for service of process which it has designated in that State, the case will then come within the principle thus stated by this Court in Simon *vs.* Southern Railway Co., 236 U. S., 115 (p. 132):

> "From the principle announced in that case it follows that service under the Louisiana statute would not be effective to give the District Court of Orleans jurisdiction over a defendant as to a cause of action arising in the State of Alabama. The service on the Southern Railway, even if in compliance with the requirements of Act 54, was *not that kind of process which could give the court jurisdiction over the person of the defendant for a cause of action arising in Alabama.*"

Upon the foregoing, we respectfully submit that if the plea to the jurisdiction be in fact good, the present proceedings in so far as the Southern is concerned, exhibit a lack of one of the essentials of "due process." This shows that the jurisdictional issue involved herein is not an ordinary question of law, but involves the denial of a fundamental constitutional right.

POINT NO. 2

Erroneous Admission of Plaintiff's Testimony as to Statements by Physicians Concerning His Eyes and Erroneous Classification of This Ruling by Circuit Court of Appeals as "Not Prejudicial Error" upon Specu-

lative Inference That Jury Was Not Influenced at All by This Testimony.

Upon the trial the plaintiff, on the issue of his alleged injuries, was permitted to testify to *statements assertedly made to him by two physicians* as to the condition of his eyes several weeks after the accident. The district judge overruled objections by defendants to the admission of this clearly hearsay testimony (Bill No. 5, R., 385-7; R., 116-7). The Circuit Court of Appeals, without specifically approving or disapproving this ruling, classified it as "*not prejudicial error*," upon the *speculative inference* that this testimony had no weight whatsoever with the jury (R., 429-30).

The admission of this hearsay testimony was *clearly erroneous*, under the fundamental principles of the law of evidence. The *speculative assumption* by the Circuit Court of Appeals that the error committed, if any, was harmless, is *in conflict with the decisions of this Court* to the effect that errors of this character can be classified as harmless *only when the court can say positively and beyond doubt* that the verdict of the jury could not have been affected or influenced to any extent by the testimony erroneously admitted.

The opinion of the Circuit Court of Appeals *does not fully reproduce* the evidence admitted over this objection. This evidence, as it appears in the record, was as follows (R., 116-7, 386):

> "*I went to see Dr. Bloom twice and they told me my eye was getting very bad. I went to see Dr. Rudolph Matas * * * Dr. Matas stated I was suffering with traumatic conjunctivitis.*"

Dr. Bloom is an *eye specialist* (R., 116). Dr. Matas is probably the *leading New Orleans physician*, and a man of national reputation. *Neither of these physicians testified in the case*, and there was no showing of any unsuccessful attempts by the plaintiff to procure their evidence.

The opinion of the Circuit Court of Appeals mentions only plaintiff's quotation of Dr. Matas. It does not mention plaintiff's quotation of Dr. Bloom, although the objections to both of these items of testimony are covered by the same bill (Bill No. 5, R., 385-7), and the same assignment (R., 53-4).

Under the *elementary principles* of the law of hearsay, the objections which we interposed to all of this testimony were *clearly good*, and the district judge clearly erred in overruling these objections.

In Vicksburg & Meridian R. R. Co. *vs.* O'Brien, 119 U. S. 99 (a personal injury suit), this Court held that a physician who had previously examined the plaintiff, and who testifies as a witness, may refer to a written statement of his findings made at the time of his examination, for the purpose of refreshing his memory, but that *the witness should not be permitted to read this statement to the jury* as a part of his testimony, although he identifies it as a correct statement prepared by him. This Court in that case said (p. 103):

> "The practice of admitting in evidence the *unsworn statements of witnesses, prepared, in* advance of trial, at the request of one party, and without the knowledge of the other party, *should not be encouraged by further departures from the established rules of evidence.*"

The evidence there held inadmissible was certainly much more authentic than the hearsay evidence admitted over our objection in the present case. In the cited case, the physician who was the author of this written statement, testified under oath to its correctness.

The principle that makes this testimony inadmissible was recognized by our Circuit Court of Appeals itself, in its recent ruling in V. S. & P. Railway Company *vs.* Godwin, 14 Fed. (2), (5th C. C. A.), 114, a personal injury suit. The plaintiff there introduced in evidence his original army discharge (a much more authentic form of proof than verbal repetition by a patient of verbal statements of physicians) for the purpose of showing that he had been an able-bodied man at the time the document was issued. In holding that this document should have been excluded, the Circuit Court of Appeals said (p. 115):

> "It was clearly not admissible for that purpose, as it was *an ex parte document, and could not have been binding upon defendant without an opportunity to cross-examine its maker.*"

The admission of testimony by a plaintiff in a damage suit for personal injuries, as to statements made to him concerning his injuries by physicians, is quite generally recognized as an erroneous violation of the rule against hearsay evidence. To this effect, see Louisville & Nashville Railroad Company *vs.* Lynch, 126 S. W., 362; 137 Ky., 696, wherein the court said:

> *"It was violative of one of the fundamental principles or rules governing the introduction of evidence to permit plaintiff to testify as to what his doctors had told him."*

To the same effect see, also, the following decisions:

Texas Power & Light Co. *vs.* Burger, 166 S. W. (Tex.), 680.

Trott *vs.* C. R. I. & P. Ry. Co., 86 N. W., 33; 115 Iowa, 80.

Johnson *vs.* Powell, 123 Pac., 881; 87 Kan. 142.

Louisville & Nashville R. R. Co. *vs.* Smith, 84 S. W., 755; 27 Ky. L. R., 257.

Zipus *vs.* United Railways & Electric Co., 108 Atl. (Md.), 884.

M. K. & T. Ry. Co. *vs.* Creswell, 78 S. W., 388; 34 Tex. Civ. Ap., 278.

The foregoing is sufficient to demonstrate that the admission of this testimony by the district judge clearly *violated the fundmental and elementary principles* of the law of evidence. The ruling admitting such testimony *conflicts* with the jurisprudence of this Court, with the prior jurisprudence of the Fifth Circuit Court of Appeals, and with the general jurisprudence on the subject.

The Circuit Court of Appeals did not specifically approve this ruling of the district judge. It merely classified the point as *"not prejudicial error."* In speaking of the remark attributed by the plaintiff to Dr. Matas, it says (R., 430):

> "As the jury had before them the testimony of several physicians who were witnesses for the plaintiff, and the testimony of several other physicians who were witnesses for the defendant—*the testimony of the former tending to prove that the trouble in plaintiff's eye was due to small pieces of glass or other foreign substances getting into it, and*

> ***the testimony of the latter tending to prove that trouble was not due to any foreign substance getting into the eye,—it seems quite reasonable to infer that the jury's conclusion as to the cause of the plaintiff's eye trouble was based on a consideration of the testimony of physicians given in the presence of the jury, and to no extent upon the above-mentioned statement of plaintiff as to what Dr. Matas said,*** especially as there was an absence of any evidence that Dr. Matas made an examination of plaintiff's eye, nothing in plaintiff's own testimony being inconsistent with the conclusion that the deposed-to statement of Dr. Matas as to the condition of plaintiff's eye was based solely on what plaintiff said to him as to the cause of the trouble. We are of opinion that there is no reasonable ground for believing that the result of the trial was affected to any extent by the statement of the plaintiff which is under consideration, and that the admission in evidence of that statement was *not prejudicial error.*"

The jurisprudence of this Court on the classification of error in the admission of testimony as "not prejudicial error" requires specifically that the Court so ruling must reach the conclusion that it is "*so clear as to be beyond doubt*" that the error did not and could not have prejudiced the party's rights to any extent (5 Wall., 808). The Circuit Court of Appeals, even in its incomplete analysis of the testimony erroneously admitted, *does not announce any such conclusion.* It simply states (R., 429-30) that the evidence of the physicians who did testify was *sharply conflicting* upon the issue of plaintiff's alleged injuries, and *it thereupon speculatively assumes* that the jury finding in favor of plaintiff upon the issue of eye injury was based

one hundred per cent upon the testimony properly admitted and tending to sustain such a finding, and *nil* upon the testimony improperly admitted and tending to sustain such a finding.

It is indeed a novel doctrine that in such a situation an appellate court can classify an obvious error in the admission of testimony as "not prejudicial" by such *speculative inference*. The conceded fact that the properly admitted testimony was *sharply conflicting* on the issue in question rather indicates that the testimony improperly admitted on this issue *may probably have been a material factor* in swaying the jury to its finding for the plaintiff.

If the holding of the Circuit Court of Appeals upon this issue were good law, *practically all errors* in the admission of evidence *could be classified as harmless and non-prejudicial*, by this method of speculative inference. In practically every case in which evidence upon an issue is erroneously admitted, the record also contains some properly admitted testimony tending to support the position on that issue of the party tendering the evidence improperly admitted.

We will now demonstrate that this ruling of the Circuit Court of Appeals, classifying a plain error in the admission of testimony as "not prejudicial error," upon the basis of what are necessarily nothing more than *speculative inferences*, is clearly at variance with the pertinent jurisprudence of this Court.

The early leading decision by this Court upon the classification of error by an appellate court as "not prejudicial error" is Deery *vs.* Cray, 5 Wall., 795. This Court

there said, in declining to so classify an error committed by the trial court (p. 807):

> "We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, *it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.* In the case before us this is not so clear."

This doctrine was reaffirmed in Gilmer *vs.* Higley, 110 U. S., 47, wherein this Court said (p. 50):

> "We have not before heard of such a rule in a revisory court. The farthest any court has gone has been to hold, that *when such court can see affirmatively that the error worked no injury to the party appealing, it will be disregarded.* This court in Deery *v.* Cray, 5 Wall., 807, used this language:
>
> "'Whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.'"

And in V. & M. Railroad *vs.* O'Brien, 119 U. S., 99, already cited *supra*, this Court said (p. 103):

> "It is, however, claimed, in behalf of the plaintiffs, that in his answers to other interrogatories the physician testified, apart from the certificate, to the material facts embodied in it, and that, therefore, the reading of it to the jury could not have prejudiced the rights of the defendant, and, for that reason, should not be a ground of reversal.

"*We are unable to say that the defendant was not injuriously affected by the reading of the physician's certificate in evidence. It is not easy to determine what weight was given to it by the jury.* In estimating the damages to be awarded in view of the extent and character of the injuries received, *the jury for aught that the court can know, may have been largely controlled by its statements.* The practice of admitting in evidence the unsworn statements of witnesses, prepared, in advance of trial, at the request of one party, and without the knowledge of the other party, should not be encouraged by further departures from the established rules of evidence.

"While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, *it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party.* Smith *v.* Shoemaker, 17 Wall., 630, 639; Deery *v.* Cray, 5 Wall., 795; Moores *v.* Nat. Bank, 104 U. S. 625, 630; Gilmer *v.* Higley, 110 U. S. 47, 50."

As we have already pointed out, the error in the admission of testimony in the case just cited was *much less consequential* than this error in the present case—and yet this Court, in the cited case, specifically declined to classify the error there committed as harmless. We have in this instance a *clear and sharp conflict* between (1) the ruling of this Court in the cited case and (2) the ruling of the Circuit Court of Appeals in the present case.

The rule in question in thus restated by this Court in Columbia & Puget Sound R. R. Co. *vs.* Hawthorne, 144 U. S., 202 (p. 208):

> "As the incompetent evidence admitted against the defendant's exception bore upon one of the principal issues on trial, and tended to prejudice the jury against the defendant, and *it cannot be known how much the jury were influenced by it*, its admission requires that the judgment be reversed."

To this effect, see also Mexia *vs.* Oliver, 148 U. S., 664, wherein this Court said (p. 673):

> "We cannot say that these errors were immaterial, as *it does not appear beyond doubt that they were errors which could not prejudice the rights of the plaintiffs*. Deery *v.* Cray, 5 Wall. 795, 807; Gilmer *v.* Higley, 110 U. S. 47, 50."

In this connection, see also Fillippon *vs.* Albion Slate Co., 250 U. S., 76, wherein this Court said (p. 82):

> "And of course in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless."

This Court has recently recognized that the rule stated by the foregoing authorities *has not been changed* by the provisions of the Act of February 26, 1919, amending Jud. Code, § 269 (now U. S. C., Title 28, § 391), and providing that there shall be no reversal for technical errors not affecting the substantial rights of a party.

In United States *vs.* River Rouge Improvement Co. *et al.*, 269 U. S., 411, this Court thus described the effect of this statute (p. 421):

> "We need not enter upon a discussion of the divergent views which have been expressed in vari-

ous circuit courts of appeals as to the effect of the Act of 1919. It suffices to say that *since the passage of this Act, as well as before*, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties—especially when embodied in the charge to a jury—is to be held a *ground for reversal, unless it appears from that whole record that it was harmless and did not prejudice the rights of the complaining party.* See Yazoo Railroad *v.* Mullins, 249 U. S. 531, 533; Fillippon *v.* Albion Slate Co., 250 U. S., 76, 82."

To the same effect, see also the very recent case of Williams *vs.* Great Southern Lumber Co., 277 U. S., 19, wherein this Court declined to classify errors in the exclusion and admission of evidence as not prejudicial, saying (p. 26):

"The judgment was properly reversed on account of these errors. This was not affected by the provision of § 269 of the Judicial Code, as amended in 1919, that in an appellate proceeding judgment shall be given after the examination of the entire record, 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' The errors in the exclusion and admission of evidence directly affected the substantial rights of the Company. *Since the passage of this act, as well as before*, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties, 'is to be held a *ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice* the rights of the complaining party.' United States *v.* River Rouge Co., 269 U. S., 411, 421, 46 S. Ct. 144, 148, 70 L. Ed. 339. *Here it cannot be said from the entire record that the errors were harm-*

less: but on the contrary they were material and of a highly prejudicial character."

As these citations show, this Court established in its early days the rule that error cannot be classified as "not prejudicial error" unless upon a finding that it is *"so clear as to be beyond doubt"* that the error did not and could not have affected the result in the trial court, and *this Court has thereafter consistently applied and enforced this principle.* The ruling of the Circuit Court of Appeals which we here assail is *based upon no such positive finding, but rather upon mere speculative inferences* to the effect that, although there was concededly a *sharp and substantial conflict* in the testimony properly admitted upon the issue of injury, the jury finding for the plaintiff on this issue should be deemed to rest entirely upon the testimony properly admitted, and not at all upon the testimony improperly admitted. This simple statement of the theory upon which the Circuit Court of Appeals classifies this error as "not prejudicial error" is sufficient to *demonstrate the conflict* between (1) the ruling of that Court herein and (2) the decisions of this Court upon the subject.

Earlier decisions of our Circuit Court of Appeals, unlike its present decision, recognize and apply properly the rule enunciated by the decisions of this Court as to the classification of error in the admission of testimony as harmless error. To this effect see the following:

Antietam Paper Company *vs.* Womble, 294 Fed. (5th C. C. A.), 795.

Klein *vs.* Darnell, 239 Fed. (5th C. C. A.), 844.

T. & P. Railway Co. *vs.* Hartford Fire Insurance Co. *et al.*, 230 Fed. (5th C. C. A.), 801.

In the very recent case of V. S. & P. Ry. Co. *vs.* Godwin, 14 Fed. (2) (5th C. C. A.), 114, cited *supra*, this *same court* was confronted with the *identical situation* here involved—the properly admitted testimony of the doctors was *sharply conflicting* upon the issue of injury and hearsay testimony had been erroneously admitted on behalf of the plaintiff upon this issue. The court there properly declined to classify the error as harmless upon the speculative inferences in which it has erroneously indulged in the present case, and said (p. 115):

> "The testimony of a number of doctors as to the extent of plaintiff's injury was very much in conflict. Necessarily that favorable to him depended largely upon his own statements as to his deafness. *It is impossible to say what effect the admission of this certificate had upon the minds of the jurors, in enabling them to resolve any conflict in the evidence.*"

The present case accordingly exhibits *a departure by the Circuit Court of Appeals from its prior habit* of observing the rule stated by the decisions of this Court, as to the classification of error as harmless.

Even the rather incomplete analysis of the testimony in question by the Circuit Court of Appeals (R., 429-30) is sufficient to show that this holding of that court amounts to a *radical departure from the rule settled by numerous decisions of this Court* as to the classification of error as harmless error. A full analysis of this testimony makes this conclusion even more apparent.

There is *ample precedent* for a full examination of the testimony in the record on this phase of the case, if

this Court sustains our obviously correct contention that the District Court erroneously violated the fundamental principles of the hearsay rule when it permitted plaintiff to testify to the jury concerning statements made to him by his physicians. To this effect see Y. & M. V. R. R. *vs.* Mullins, Admx., 249 U. S., 531 (p. 532):

> "It is true generally in cases coming from lower Federal courts that the rendering of an erroneous decision on a particular question, Fidelity & Deposit Co. *v.* Courtney, 186 U. S., 342, 351; West *v.* Camden, 135 U. S., 507, 521; or the assignment by the lower court of an erroneous reason for a right decision; Seaboard Air Line *v.* Moore, 228 U. S., 433, 435; United States *v.* One Distillery, 174 U. S., 149, 151; will not entitle the complaining party to reversal, *if it is clear that his rights were not prejudiced thereby.* And this is likewise true of cases coming from State courts. Chicago, Rock Island & Pacific Ry. Co. *v.* Wright, 239 U. S., 548, 551; New York, Philadelphia & Norfolk R. R. Co. *v.* Peninsula Exchange, 240 U. S., 34, 41-42. See Murdock *v.* City of Memphis, 20 Wall., 590. *Whether the case comes from a State court or Federal court, this Court will, for the purpose of determining whether the error found may have been prejudicial, examine the whole record;* State questions being left to the decision of the State court in cases coming here from those courts."

As already stated, the testimony thus admitted over our objections included not only plaintiff's statement that *Dr. Rudolph Matas told him he "was suffering with traumatic conjunctivitis,"* but also plaintiff's statement *"I went to Dr. Bloom twice and they told me my eye was getting very bad"* (R., 116-7; Bill No. 5, R., 385-7). The Circuit

Court of Appeals says that the jury may have inferred that Dr. Matas' statement to plaintiff was based merely upon plaintiff's statement to him, and not upon any examination by him of the plaintiff's eyes (R., 430).

This is the *merest speculation*, since the record is silent on the subject. However, no such *inference could possibly be drawn as to the remark which plaintiff attributed to Dr. Bloom*, since plaintiff specifically states that this remark followed two visits by him to that office (R., 116-7), and that he was taken to Dr. Bloom for an examination of his eyes (R., 116-7).

A brief consideration of the testimony of the three physicians, referred to by the Circuit Court of Appeals as tending to support the jury finding for the plaintiff upon the issue of injury (R., 429-30), will show that there is *no reasonable basis for the speculative inference* of that court that this jury verdict was based entirely upon this admissible testimony, and was not influenced in any way by the erroneously admitted evidence under discussion. The three physicians in question are Dr. Wiltz, Dr. Simms and Dr. Davis.

Dr. Wiltz simply testified that he saw plaintiff a few days after the accident, and found his eyes "red, irritated and watery," and that he referred him to an eye specialist (R., 101).

This eye specialist was Dr. Simms, whose diagnosis of the plaintiff's complaint as traumatic conjunctivitis, or inflammation due to an injury to the eyes, is stressed by the Circuit Court of Appeals in its opinion (R., 429), as a basis for its conclusion that the erroneous admission of

the testimony in question was "not prejudicial error." This witness *very frankly admits* that this diagnosis was based entirely upon the history of the case as given to him by his patient, and that he could see no laceration of the eyes or other evidence showing that the inflammation was traumatic in its origin. To this effect, he testified as follows (R., 109-10):

> "Q. What kind of conjunctivitis was it, traumatic or simple?
>
> A. I diagnosed it as traumatic from the history of the case, but *as far as knowing I can't say.* Conjunctivitis is conjunctivitis. *I diagnosed it as traumatic from the history, the information I got from him.*
>
> Q. What do you mean by traumatic?
>
> A. Inflammation caused by an injury.

Cross-examination.

> By Mr. Suthon:
>
> *Q. Could you see any evidence in Chalters' eyes to show that this was traumatic conjunctivitis rather than simple conjunctivitis?*
>
> *A. No, I couldn't.*
>
> Q. You saw no evidence of injury to his eyes?
>
> A. Yes, there was evidence, the inflammation was there.
>
> Q. That might have been due to injury or some other cause as far as appearance, is that correct?
>
> A. As far as appearance, yes sir.
>
> *Q. Was any laceration of the eye visible?*
>
> *A. No, sir.*"

The plaintiff's visits to this physician terminated in the latter part of March, 1926. Under cross-examination,

this physician identified a written statement which he had signed concerning the treatment of the plaintiff, which reads in part as follows (R., 111):

> "Begun treatment on Feb. 4, 1926, for traumatic conjunctivitis. *He was discharged as well March* 19, 1926. In my judgment, there will be *no permanent injury* following the condition for which I treated him."

Plaintiff says that he stopped going to see Dr. Simms just about the time of his interviews in question with Dr. Bloom and Dr. Matas (R., 116-7). Accordingly the erroneously admitted testimony ascribes to Dr. Bloom the statement that plaintiff's eye *"was getting very bad,"* and to Dr. Matas the statement that plaintiff was *"suffering with traumatic conjunctivitis"* (R., 116-7), at just about the date when Dr. Simms, plaintiff's own witness, testified that he had discharged plaintiff as well, with no permanent injury (R., 111-2).

This analysis shows that the *erroneously admitted testimony in question really tended to make out a much stronger case for plaintiff than did the properly admitted testimony* of this medical witness for plaintiff. In such a situation, *it surely cannot be "so clear as to be beyond doubt"* (5 Wall., 808) that the jury verdict was not influenced or affected at all by the testimony erroneously admitted.

The other physician whose testimony is referred to by the Circuit Court of Appeals as tending to support the plaintiff's case upon this issue, is Dr. Davis, who did not see plaintiff until June, 1926 (R., 102-4), about *two months*

after the date of the remarks attributed by the plaintiff to Dr. Bloom and Dr. Matas. He testified that he removed a piece of glass from plaintiff's eyelid—not plaintiff's eye, as the Circuit Court of Appeals erroneously says—in September, 1926 (R., 102-7).

Under cross-examination, this witness very frankly admitted that he did not ascribe the conjunctivitis or eye-inflammation, which he found, to this piece of glass removed from the eyelid, but that he rather ascribed it to particles of foreign matter other than glass, removed from plaintiff's eyes in June, 1926. To this effect, he testified as follows (R., 105-6):

> "Q. Could conjunctivitis be caused by this foreign body which you removed from his eyes?
>
> A. The foreign bodies I first removed could have caused the conjunctivitis he had at that time.
>
> Q. What were those foreign bodies, Doctor?
>
> A. I can't tell you, in amount, possibly twenty-five or thirty different particles I removed at that time, and they were principally dust, particles of sand and things of that kind.
>
> *Q. Did you notice any foreign bodies that you could identify as glass at that time?*
>
> *A. No, sir.*
>
> Q. Now, this foreign body which you removed in September, 1926, and you identified as glass, could that have caused conjunctivitis?
>
> *A. There was very little conjunctivitis present at that time, so I would say that was not primarily responsible for the conjunctivitis that he had at the time I first saw him.*"

While the testimony of this physician that he found a piece of glass in the plaintiff's eyelid and removed it

tended to support the plaintiff's case, his testimony, quoted above, is clearly to the effect that he did not attribute the conjunctivitis, or eye inflammation, to this piece of glass, but rather to particles of foreign matter other than glass removed from plaintiff's eyes. Since defendant is only charged with injuring plaintiff's eyes by causing particles of broken glass to enter same, this latter bit of testimony certainly *does not tend to support the plaintiff's case* on this issue.

The remarks which plaintiff as a witness attributed to Dr. Bloom and Dr. Matas (R., 116-7) concerning the condition of his eyes, also conflicted sharply with the testimony of Dr. Hardin, a witness for defendants, to whom the plaintiff went immediately after his visit to Dr. Matas' office (R., 117).

Dr. Hardin testified that he found plaintiff suffering with mild conjunctivitis, with no evidence of injury (R., 214-7). Dr. Crebbin and Dr. Buffington who examined plaintiff's eyes after the institution of the suit, also testified, as witnesses for defendants, that they found no evidence or indication of injury (R., 197, 220).

While the petition charged permanent injury (R., 3-4), all of the expert oculists who testified agreed that there was no permanent injury (R., 106, 111, 203, 217, 221, 223). Counsel for plaintiff accordingly *waived the claim for damages for permanent injury* just before the case was argued to the jury (R., 235). The case was then submitted to the jury on the issue of temporary injury only (R., 370), and *upon that issue the erroneously admitted testimony discussed above tended to sustain the case of the plaintiff.*

Plaintiff also had the deposition (not mentioned in the opinion of the Circuit Court of Appeals) of a Dr. Carmichael in Washington, who testified to removing small particles of glass from plaintiff's eyes a day or so after the date of the alleged accident (R., 261-8). This physician did not see plaintiff after February 2, 1926 (R., 261-2), and his testimony accordingly *threw no light* upon the issue of the condition of plaintiff's eyes several weeks after the accident—*the issue upon which defendants were prejudiced* before the jury through the erroneous admission of the hearsay testimony under discussion. This witness admitted under cross-examination that *there were no lacerations or cuts on plaintiff's eyeballs*, although he testified to small abrasions and contusions on the eyelids (R., 265).

The rule against the admission of hearsay testimony is one of the *fundamental and well established principles* of the law of evidence. The argument for a relaxation of that rule in instances when the party quoted is not available as a witness, has *no application whatsoever here.* The rulings of the district judge admitting this testimony over our specific objections were *obviously erroneous.* The failure of the Circuit Court of Appeals to specifically so hold, and the action of that Court in classifying the admission of this evidence as "*not prejudicial error,*" are both *clearly at variance with the pertinent decisions of this Court* and the earlier decisions of that court itself. Upon this point, the judgment under review should clearly be *reversed.*

Point No 3.

Erroneous Admission of Letters from Third Persons to Plaintiff on Claim for Loss of Earnings and Improper Classification of This as Not Reversible Error.

This point (Bill No. 10, R., 400-3) involves the principles of (1) the *hearsay rule* and (2) the classification of error as *harmless error*, discussed in the preceding section of this brief. The ruling of which we complain was made upon the introduction of testimony as to the issue raised by the allegation of the petition that the injuries to plaintiff's eyes had caused him to *lose earnings* amounting to $500 as representative of the Mullins River Lumber Company of Central America (R., 3-4). The Circuit Court of Appeals classifies the ruling as one which *"did not involve reversible error"* (R., 430-2).

The testimony of the plaintiff as a witness on his own behalf tended to show that he was active before the accident as a representative of the concern in question, in an effort to negotiate sales of its products, and that he had succeeded in interesting several prospective buyers who were disposed to purchase (R., 119-21). He further testified that the injury to his eyes prevented him from following up and concluding these deals (R., 121).

The defendants did not dispute plaintiff's employment by this concern. The sole theory of the defense on this phase of the case is that the concern was *a mere promotion scheme which never passed beyond that stage*, and that *it would not have been able to make deliveries* upon any contracts for the sale of its products which plaintiff (but for his alleged injury) might have negotiated.

This theory of the defense is corroborated by the plaintiff's admission that the Mullins River Lumber Company was "*just newly formed*" (R., 120); and also by his admission that his salary of $100 per month was to begin *when "the products were ready for delivery"* (R., 120); and also by his admission that *he had never at any time actually received any compensation whatsoever from the concern* in question (R., 133-4). It is thus evident that, even if the effects of the accident did prevent plaintiff from negotiating sales of the products of the concern in question, *the fact of a pecuniary loss from this depended upon whether plaintiff's principal was functioning as a going concern*, able to make deliveries on contracts for the sales of its products.

The proof on behalf of the defendants (R., 361-5) on this issue is well summarized by the Circuit Court of Appeals in the following language (R., 431):

> "The defendant introduced in evidence the depositions of two witnesses who resided in Honduras (where the Company mentioned was organized and located), and had knowledge of that Company. Their testimony was to the effect that that Company was organized for the purpose of operating a saw mill to convert logs into lumber, *that it had not operated a saw mill or produced anything at the time the depositions were taken*, that plaintiff was employed by that Company and was to get a commission on any business transacted in New Orleans, but he had made no sale and had earned no commissions, and *that that Company was not in a position to fill, by shipment of lumber, any orders for sales of lumber which plaintiff might have obtained* during the months of December, 1925, and January to and including July, 1926."

One of these witnesses, an official of the concern, testified specifically as follows (R., 364):

> "Cross-inty. No. 5. What, in your opinion, could Aaron A. B. Chatters, or any other representative, have earned under the aforementioned contract during the first six months of the year 1926, if he had devoted a reasonable amount of time and energy towards the duties therein stipulated:
>
> "Answer: *We had nothing for him to do and he could have earned absolutely nothing.*"

The other of these witnesses, a resident of Mullins River, testified as follows (p. 365):

> "Cross-inty. No. 1. Please state the general nature of business conducted by the Mullins River Lumber Co.?
>
> "Answer. *Not conducting any business, but intend to cut timber.*
>
> "Cross-inty. No. 2. Does it sell or is it able to sell any products of any kind or nature; if so, state the nature of those products?
>
> "Answer. *No.*"

The plaintiff was called as a witness in rebuttal, *for the specific and restricted purpose of rebutting the defendants' proof on this issue* (R., 229). He identified a *letter* of date November 5, 1925, written to him by the secretary of the Mullins River Lumber Company in Central America, and this letter was admitted in evidence and read to the jury, over the *objection* of counsel for defendants that the writer of the letter was *not produced as a witness under oath and was not subject to cross-examination* (R., 231-3).

This letter contains the following specific passages amounting clearly to *assertions of fact by the writer* that

the Mullins River Lumber Company was *then functioning as a going concern*, and capable of producing and delivering logs or lumber on any contracts for the sale of its products which Chatters might negotiate (p. 232):

> "Your communication of the 27th of October, 1925, came safely to hand and we note with satisfaction that *you have succeeded in disposing of all the Mahogany and Cedar we are capable of producing.*
>
> * * * * * * *
>
> *"We can make delivery in almost short notice."*

This letter was introduced in evidence *for the specific purpose of rebutting the defendants' depositions* on this point, as summarized above, and the suggestion of the Circuit Court of Appeals that nothing in the letter rebutted or conflicted with the defendants' depositions (R., 431) is *at variance with the plain language of the letter*. The letter specifically said "Yes" and the deposition specifically said "No" on the question: "Was the plaintiff's principal a going concern capable of fulfilling, to plaintiff's profit as a salesman, any contracts which he might negotiate for the sale of its products?"

In the recent case of Leach & Company *vs.* Pierson, 275 U. S., 120, this Court held that a letter written by one litigant to the other litigant is not admissible in evidence on behalf of the writer, as proof of the asserted facts therein set forth. To this effect this Court said (p. 128):

> *"A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts."*

Paraphrasing the language thus used by this Court, we submit that a man is equally barred from making evidence for himself by producing letters written to him by some third person and containing assertions of fact, *when the writer of the letter does not appear as a witness, under oath and subject to cross-examination.*

This letter from this Central American promoter was certainly a *much less authentic document* than the army discharge which the plaintiff put in evidence in the case of V. S. & P. Ry. Co. *vs.* Godwin, 14 Fed. (2), (5th C. C. A.), 114, cited *supra.* Our Circuit Court of Appeals in that case held this to be *reversible error,* since the army discharge was an *ex parte* document, and the defendant had no opportunity to cross-examine the author of the statements therein contained. The ruling in that case *clearly conflicts* with the ruling in the present case admitting the letter in question.

The ruling admitting the letter in question in evidence in the present case is also at variance with numerous authorities on the subject, from which we quote and cite the following:

Texas Company *vs.* Brilliant Manufacturing Company, 2 Fed. (2), (3rd C. C. A.), 1 (p. 2):

> "Defendant further contends that the trial judge erred in refusing to admit the plaintiff's letter of March 26, 1923, to the H. D. Beach Company and its reply. Considering the reply first, we do not see any theory under the facts on this case on which it was admissible. *It was not under oath and not subject to cross-examination.* The Beach Company was not a party to the suit, and

what it said could in no way bind the plaintiff any more than what plaintiff said to the Beach Company could bind the defendant. The testimony of the Beach Company was avaliable, and *if the defendant desired in evidence the contents of the letter, testimony should have been taken under oath in the usual way. The offer was properly overruled.*"

Consolidated Grocery Company *et al. vs.* Hammond, 175 Fed. (5th C. C. A.), 641 (p. 645):

> **"The letter, having been written by a third person, without the knowledge of the defendants, and without their subsequent sanction or approval, seems to us to be *hearsay testimony*, so far as the defendants are concerned, and, for that reason, *inadmissible* against them. Nevada Company *vs.* Farnsworth, 102 Fed. 573, 42 C. C. A. 504; Dwyer *vs.* Dunbar, 5 Wall., 318, 18 L. Ed. 489; Insurance Company *vs.* Guardiola, 129 U. S. 642, 9 Sup. Ct. 425, 32 L. Ed. 802; 1 Greenleaf on Evidence (16th Ed.), § 98 *et seq.*; 2 Wigmore on Evidence, § 1361 *et seq.*"**

Great Southern Lumber Company *vs.* Williams, 17 Fed. (2), (5th C. C. A.), 468, affirmed 277 U. S. 19.

Security Trust Company *vs.* Robb *et al.*, 142 Fed. (3rd C. C. A.), 78.

Nevada Company *vs.* Farnsworth, 102 Fed. (8th C. C. A.), 573.

This principle is merely another detailed application of the fundamental rule against the admission of hearsay testimony (a rule which the Circuit Court of Appeals in the present case disregarded).

The assertion of the Circuit Court of Appeals that the ruling admitting the letter in question "did not involve reversible error" is *entirely demolished* by the quoted language of the document itself. The authorities which we have cited and quoted in the preceding section of this brief as to the circumstances which will justify an appellate court in classifying the erroneous admission of testimony as "not reversible error," are pertinent also to the point now under discussion. Under these authorities the Circuit Court of Appeals is clearly wrong in classifying the erroneous admission of this letter in evidence as a ruling which "did not involve reversible error."

POINT NO. 4.

Erroneous Denial of Peremptory Instruction on Claim for Loss of Earnings.

At the conclusion of the evidence, the defendants moved for a *peremptory instruction*, withdrawing from the jury the plaintiff's claim for $500 as asserted loss of earnings as a representative of the Mullins River Lumber Company (R., 235). The district judge denied this motion and a bill was duly reserved (Bill No. 11, R., 403-5). The Circuit Court of Appeals approved this ruling, holding that the issue was a question for the jury (R., 432).

The testimony upon this issue is fully stated in the foregoing section of this brief. This testimony shows that while the plaintiff was unquestionably active as the representative of this concern, he had admittedly never received any compensation whatsoever from it up to the time of the accident (R., 133-4), and his earnings from this source were admittedly dependent upon the ability

of this concern to make deliveries of its products under such contracts as the plaintiff might negotiate (R., 120).

The plaintiff himself admitted that the concern was "just newly formed" (R., 120). The depositions which the defendant took in Central America (R., 361-5)—the only sworn testimony by witnesses having knowledge of that locality—were to the effect that this concern was a *mere promotion scheme which had not passed beyond that stage*, either at the time of plaintiff's alleged disability or thereafter, and which never had any products to deliver.

The only real *possible contradiction* of these depositions is found in the *erroneously admitted letter* written to plaintiff by a Central American representative of this concern (R., 232-3), which contains statements as to the ability of this concern to produce and to deliver lumber to customers whom plaintiff might find. The error in the admission of this letter has been discussed in the foregoing section of this brief.

If we take the view of this letter erroneously taken by the Circuit Court of Appeals, that nothing therein "rebutted or was in conflict with the testimony contained in the depositions introduced by the defendants" (R., 431), then there is no contradiction whatsoever of defendants' proof to the effect that this concern was a mere promotion scheme, never able to pay salaries or commissions dependent upon its ability to make actual deliveries of logs or lumber. *This puts the Circuit Court of Appeals in this dilemma: if its ruling on the admission of the letter is correct, then its ruling on the motion to direct a verdict for defendants upon this item of the claim is erroneous; and its ruling on this motion to direct a verdict can possibly be*

correct only if its ruling on the admission of the letter be erroneous.

Since the plaintiff's ability to earn money as a representative of this concern was dependent upon the concern's ability to deliver its products to customers found by the plaintiff; since the only sworn testimony in the record on the subject is to the effect that the concern was a mere promotion scheme which never had any products to deliver (R., 361-5); and since the only possible proof to the contrary is a letter erroneously admitted (R., 232-3), without the attestations of even the *ex parte* oath of the writer, we submit that the case comes within the rule (Small Company *vs.* Lamborn & Company, 267 U. S., 248; Martin *vs.* I. C. R. R. Co., 23 Fed. (2) (5th C. C. A.), 324; Hardy-Burlingham Mining Company *vs. Baker*, 10 Fed. (2) (6th C. C. A.), 277) that in the Federal courts, upon a motion for peremptory instructions, a *mere scintilla or modicum of conflicting evidence* does not entitle the adverse party to go to the jury.

The record contains *no real, definite and positive testimony* tending to support the contention that this concern functioned actively and was able to make deliveries and did actually make deliveries (a condition precedent to plaintiff's receiving compensation from this source) during the period of plaintiff's alleged disability. The following comments are accordingly appropriate upon the case for the plaintiff upon this issue.

> Noble *vs.* Crane & Company, 169 Fed. (6th C. C. A.), 55 (p. 59):
>
> "So that it is the duty of the court to direct a verdict unless the conflict is positive. The conflict must be real, not merely apparent. A mere dogmatic assertion, which does not appeal to the rea-

> **son of the court, which does not have substance and relevant consequence, which does not have fitness to induce conviction, is not proof, even if uncontradicted, and does not interfere with the duty of the court to direct a verdict."**
>
> **Minahan *vs.* Grand Trunk Railway, 138 Fed. (6th C. C. A.), 37 (p. 46):**
>
> **"And by 'evidence' we mean something of substance and relevant consequence, and not vague, uncertain or irrelevant matter not carrying the quality of 'proof' or having fitness to induce conviction."**

Upon the foregoing, we respectfully submit that the District Court erred when it permitted the plaintiff to go to the jury on his claim for loss of earnings as the lumber salesman of a promotion scheme which provenly never passed beyond that stage.

POINT No. 5.

Erroneous Peremptory Charge on Joint Liability.

While the district judge left the question of negligence to the jury (R., 370-2), *he peremptorily charged that the operation of the through train in question by the defendants was a joint enterprise, in the nature of a partnership, and that the liability of defendants to the plaintiff was a joint liability.* To this effect, he said (R., 372-3):

> "• • • in this case the selling or initial carrier, the selling agency, the Louisville & Nashville Railroad Company, did something more than merely sell the ticket. It participated in the *joint operation of the train, a sort of partnership.*
>
> • • • • • • •
>
> "Under the circumstances as they are shown

here the liability of these two defendant carriers is *joint.*

. . . . . .

"Here is a *joint enterprise* in which these carriers shared in the delivery of this passenger by reason of the manner in which this transportation was handled. *They assumed the obligation jointly* with this plaintiff to deliver him in Washington safely in this particular train."

The L. & N. excepted to this charge (Bill No. 4, R., 381-5) upon grounds fully discussed in its concurrent application for certiorari in this case. The Southern also excepted to the charge (Bill No. 16, R., 415-9) *"in so far as it makes the Southern Railway Company responsible for negligence of the Louisville & Nashville Railroad Company."* (R., 418.)

The charge in question was approved in the opinion of the Circuit Court of Appeals. The critical comment in that opinion upon the length of the portion of the charge embodied in this bill (R., 432), is without justification. *The district judge elaborated at considerable length upon his theory of joint liability and his reasons for so charging.* Each defendant *specifically excepted* to the charge imposing a joint liability on the defendants (R., 376), but in the preparation of the bills (Bill No. 4, R., 381-5; Bill No. 16, R., 415-9), in justice to the plaintiff and to the district judge, counsel for defendants *naturally and properly reproduced all of the discussions and comment in the charge on the subject of joint liability and the so-called joint enterprise.*

The charge on joint liability has been fully discussed in the L. & N.'s concurrent application for certiorari, and the authorities cited there are pertinent upon our com-

plaint as to this charge also. We desire to add the following to the citations made by the counsel for the L. & N. on this point:

Pennsylvania Railroad Company *vs.* Jones, 155 U. S., 333:

> "It is the duty of a railroad company, running its trains in connection with other lines, and taking passengers and freight for transportation to points upon connecting lines, to carry them safely to the end of its own line, and there deliver them to the next carrier in the route beyond, and, *in the absence of a special agreement to extend its liability beyond its own lines, such liability will not attach;* and such agreement will not be inferred from doubtful expressions or loose language, but it must be established by clear and satisfactory evidence."

This charge on joint liability is also *clearly at variance with the decisions of this Court* which we have cited in arguing our plea to the jurisdiction (Peterson *vs. C. R. I. & B. Ry. Co.*, 205 U. S., 364; Philadelphia & Reading Co. *vs.* McKibben, 243, U. S., 264; General Investment Company *vs.* Lake Shore & M. S. Ry. Co., 260 U. S., 261, affirming 250 Fed. (6th C. C. A., 160), to the effect that the sale of through tickets and the operation of through trains and through cars is *not such a joint enterprise* as to give to the connecting carriers the status of doing business in the State where the tickets are sold by the initial carrier.

The charge embodying this theory of joint liability was clearly erroneous and this error was *clearly prejudicial to the Southern.* Under the charge as given, the jury was told in substance to return a verdict against both defendants, upon a finding of negligence on the part of either. Since each defendant denied negligence, and since the judge left the question of negligence to the jury, the

verdict against both defendants *may have represented a finding that only one defendant was actually negligent.* For example, the jury may have concluded that the L. & N. was negligent in the inspection of the car and in the preparation of the train at New Orleans, and that the Southern used reasonable care in its inspection and handling of the car from Atlanta to the point of the accident (R., 284-361) and was itself guilty of no negligence.

The evidence showed that the train was *inspected by the Southern* when it reached that line at Atlanta, and also at several points between that point and the point of the accident (R., 284-361; R., 407-8). This inspection, in so far as the screen in question were concerned, was made by a railroad employee who walked along the ground beside the train and looked at the sides of the cars, seeking to observe anything loose or out of order. Such an inspection, however, as to a train in transit was *the only inspection which could be made "consistently with the conduct of the carrier's business."* It was clearly permissible for the jury to find from this evidence that the Southern, as a connecting carrier, had performed its duty of inspection as defined as follows in 10 C. J., 953:

> "The care required as to roadbed, track, machinery, and appliances is not fully exercised by an originally safe construction, but involves such constant inspection for the purpose of discovering defects or dangers which may be developed in the operation of the road, and in remedying the same, as the highest degree of care and foresight would suggest, so far as practicable, *consistently with the carrying on of the carrier's business, and* a neglect of this duty renders the carrier liable to passengers who may be injured by reason of any defect which might have been discovered by such inspection.

> This inspection with respect to both its mode and frequency must be such as can be done consistently with the conduct of the carrier's business. The frequency of inspection is dependent on the liability to impairment, the consequences of which may be apprehended as a result of defective conditions; but *the carrier is not required to keep up a continuous inspection, or to know at each moment the condition of every part of a train.*"

Even if it be assumed that the issue of the Southern's liability, upon its own negligence, was for the jury, *the Southern was at least entitled to have the jury consider this issue unprejudiced by erroneous instructions authorizing the jury to find against the Southern upon the theory of "joint liability," even though it might conclude that the L. & N. was the only negligent defendant.*

Upon the foregoing we respectfully submit that the peremptory charge on joint liability given by the district judge was erroneous and that this error was prejudicial as to the Southern.

Conclusion.

For the foregoing reasons, we respectfully submit that the judgment under review should be reversed.

Respectfully submitted,

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